

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM E. CINI,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-CV-2630
	:	
NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK), et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Robert F. Kelly, J.

November 19, 1999

Plaintiff William E. Cini ("Mr. Cini") brings this action against his former employer, National Railroad Passenger Corporation ("Amtrak"), alleging state law claims of wrongful discharge, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress, all arising out of Mr. Cini's discharge from employment. All of the claims are founded on Pennsylvania law.

Presently before this Court is Amtrak's Motion to Dismiss, or in the alternative, for Summary Judgment. Amtrak contends that Mr. Cini's state law claims are preempted by the Railway Labor Act ("RLA")¹ because Mr. Cini's employment was governed by a collective bargaining agreement between Amtrak and the American Railway and Airway Supervisor's Association ("the

¹ 45 U.S.C. § 151 et. seq.

Union.") Amtrak also contends that Mr. Cini's claims otherwise lack merit. For the reasons which follow, Amtrak's Motion is granted in part and denied in part.

I. BACKGROUND

At all times relevant to this discussion, Mr. Cini was employed by Amtrak as a Foreman of the Customer Service Department at Amtrak's 30th Street Station in Philadelphia, Pennsylvania. He was represented by the Union for purposes of collective bargaining during his employment with Amtrak.

Beginning in or around March of 1995, Mr. Cini voiced several concerns regarding train safety and on-time performance to Amtrak managers, to which he received written responses. On May 6, 1998, Mr. Cini received, pursuant to the terms of the collective bargaining agreement, a Notice of Investigation from Defendant William V. Conaty, Manager of Customer Service for Amtrak. The Notice charged Mr. Cini with fraudulent misuse of Amtrak funds and fraudulent modification of time cards. A hearing took place from June 2 to June 5, before a hearing officer, Defendant Stanley Winkler, Jr., after which Mr. Cini was found guilty of dishonesty and fraud. On June 19, 1998, Mr. Cini was discharged from Amtrak's employ by Defendant Lenore A. Slimbock. However, on or around July 13, 1998, Amtrak reached an agreement with the Union whereby Mr. Cini was reinstated to his former position.

Mr. Cini then filed this action in the Court of Common Pleas of Philadelphia County, which Amtrak removed to this Court.

Amtrak subsequently filed a Motion for a More Definite Statement in response to Mr. Cini's original complaint. By Order dated July 1, 1999, this Court granted Amtrak's Motion and further ordered Mr. Cini to develop his defamation claim by specifying each defamatory statement allegedly made about him, the speakers of the statements, and to whom they were made. Subsequently, on July 26, 1999, Mr. Cini filed his First Amended Complaint.

II. STANDARD

While Amtrak has framed this Motion as a Motion to Dismiss or, in the Alternative, For Summary Judgment, and both parties have submitted material additional to the pleadings, this Court's present determination is based solely on the pleadings. Accordingly, we treat this Motion as a Motion to Dismiss.

A motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In

considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. DISCUSSION

A. Negligent Infliction of Emotional Distress

In his Response to Amtrak's present Motion, Mr. Cini has failed to address Amtrak's challenge to his negligent infliction of emotional distress claim. Therefore, Amtrak's Motion is granted as unopposed with respect to this claim, and the claim is dismissed. See Ricciardi v. Consolidated R.R. Corp., No. Civ. A. 98-3420, 1999 WL 77253, at *3 (E.D. Pa. Feb. 8, 1999) (holding plaintiff's failure to respond to defendant's argument that plaintiff's wrongful discharge claim should be dismissed was sufficient to justify dismissal of claim); Carter v. Dragovich, Nos. Civ. A. 96-6496, Civ. A. 94-7163, 1999 WL 549030 (E.D.Pa. 1999) (holding that plaintiff's failure to respond to motion to dismiss with respect to certain claims justified dismissal of those claims as unopposed.)

Further, a review of the complaint reveals that this claim lacks merit. Pennsylvania law recognizes the tort of negligent infliction of emotional distress and permits a plaintiff to recover for any mental suffering that results from physical injury, however slight, if the defendant's negligence

caused the physical injury. DeCesare v. National R.R. Passenger Corp., 1999 WL 330258, at *7 (E.D.Pa. May 24, 1999). However, the claim will stand in only two circumstances: (1) where a close family member experiences a contemporaneous sensory observance of physical injuries being inflicted on another family member; or (2) where the plaintiff nearly experiences a physical impact in that he was in the zone of danger of the defendant's tortious conduct. Hunger v. Grand Cent. Sanitation, 447 Pa.Super. 575, 585, 670 A.2d 173, 178 (1995). Mr. Cini's First Amended Complaint makes no mention of any physical impact experienced by himself or a close family member. As such, Mr. Cini has failed to allege either of the two circumstances which would permit recovery under this tort. Id. ("A plaintiff cannot recover for emotional upset where there is no physical impact involved in the case at all.")²

² There is case law in Pennsylvania which appears to also recognize a claim for negligent infliction of emotional distress, even in the absence of physical impact, where a plaintiff alleges his distress is "a result of a breach by a defendant of a distinct pre-existing duty of care, that is in essence an independent tort." Regan v. Township of Lower Merion, 36 F.Supp.2d 245 (E.D.Pa. 1999); Green v. Bryant, 887 F.Supp. 798 (E.D.Pa. 1995); Herbert v. Greyhound Lines, Inc., No. CIV. A. 93-5447, 1994 WL 493732 (E.D.Pa. 1994). However, Mr. Cini has failed to allege the existence of any duty of care owed to him by Amtrak which was breached, and as such, his claim must fail. Denton v. Silver Stream Nursing and Rehabilitation Ctr., 1999 WL 796303, at *6 (Pa.Super. Oct. 7, 1999)(upholding trial court's dismissal of plaintiff's negligent infliction of emotional distress claim where appellant failed to establish any articulable duty owed by employer). Further, terminating a worker's employment does not constitute a breach of duty

B. Wrongful Discharge

Mr. Cini next attempts to advance a claim for wrongful discharge, alleging that Amtrak discharged him in retaliation for voicing concerns regarding public safety and Amtrak management. Pennsylvania law, subject to a few very narrow exceptions, generally does not provide at-will employees with a common law cause of action for wrongful discharge. Holewinski v. Children's Hosp. of Pittsburgh, 437 Pa.Super. 174, 178, 649 A.2d 712, 715 (1994)(citations omitted). However, while a very limited action for wrongful discharge does exist, it is available only to at-will employees, because employees who are not at-will may bring their claims under breach of contract theories. Ricciardi, 1999 WL 77253, at *2 (citations omitted). In the instant case, because Mr. Cini's employment was covered under a collective bargaining agreement, he is not an at-will employee. See Id. at *3 (holding that plaintiff who was covered under collective bargaining agreement was not at-will employee and, therefore, not permitted under Pennsylvania law to bring wrongful discharge claim against employer); Henderson v. Merck & Co., Inc., 998 F.Supp 532 (E.D.Pa. 1998)(holding that union employee cannot bring wrongful discharge action against former employer under Pennsylvania law); Searcy v. SEPTA, No. Civ. A. 96-3854, 1997 WL

sufficient to support a claim for negligent infliction of emotional distress. Regan, 36 F.Supp. at 252.

152791 (E.D.Pa. Mar. 27, 1997) (stating that wrongful discharge action is not available to a union member protected by a collective bargaining agreement.) Thus, no action for wrongful discharge is available to Mr. Cini under Pennsylvania law, and this claim is dismissed.

An appropriate Order follows.